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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MOUNTAINWEST FINANCIAL CORPORATION,
Petitioner,

–v.–

VISA U.S.A. INC.,
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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April 19, 1995

QUESTIONS PRESENTED FOR REVIEW

This case involves an antitrust challenge to a powerful joint venture's restraint of trade that has prevented increased competition while achieving no efficiencies. The opinion below, which nullified a jury verdict and validated the restraint as a matter of law, squarely presents two questions that have each produced three-way conflicts among the circuits in joint venture rule of reason cases:

1. In order to be ancillary under the rule of reason, must a joint venture's restraint of trade be:

   a. reasonably related to the venture's business interests, irrespective of efficiencies (10th Circuit);

   b. reasonably necessary to enhance the venture's efficiencies (D.C. Circuit and federal antitrust enforcement guidelines); or

   c. the least restrictive alternative to enhance the venture's efficiencies (1st, 2d and 9th Circuits)?

2. In evaluating a joint venture's restraint of trade under the rule of reason, is the market power of the venture:

   a. an important factor but not a threshold requirement (2d and 3d Circuits);

   b. a threshold requirement, which can be satisfied by a showing that the venture members possess a large collective market share and that the venture can disadvantage competitors (D.C., 4th, 5th and 11th Circuits, and federal antitrust enforcement guidelines); or

   c. an elevated threshold requirement, which disregards large collective market share and requires a showing that exclusion from the venture effectively entails exclusion from the relevant market (7th and 10th Circuits)?

PARTIES TO THE PROCEEDING

Petitioner MountainWest Financial Corporation, formerly known as SCFC ILC Inc. d/b/a MountainWest Financial, was plaintiff-appellee in Civil Action No. 91-C-47B below. Dean Witter, Discover & Co., formerly known as Dean Witter Financial Services Group, Inc., is the parent corporation of MountainWest Financial Corporation. (At the time this action was filed, Dean Witter Financial Services Group, Inc. was a wholly owned subsidiary of Sears, Roebuck and Co.; this is no longer the case. Thus, at trial and in the decisions below, Petitioner was sometimes referred to as "Sears.") For ease of reference, Petitioner will herein be denominated, where appropriate, as Dean Witter.

Respondent Visa U.S.A. Inc., a nationwide joint venture of banks and other financial institutions, was defendant-appellant below.

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VISA U.S.A. INC.,

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For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a Writ of Certiorari to review the judgment entered by the United States Court of Appeals for the Tenth Circuit in this proceeding.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at 36 F.3d 958 (10th Cir. 1994) and is reprinted in the Appendix ("App.") to this petition at 1a-26a. On December 5, 1994, the Tenth Circuit denied Petitioner's petition for rehearing and suggestion of rehearing en banc. App. 128a. The Tenth Circuit's opinion reversed an order and opinion of the United States District Court for the District of Utah, which upheld a final verdict rendered by a jury in favor of Petitioner on claims brought under Section 1 of

the Sherman Act. The District Court's opinion is reported at 819 F. Supp. 956 (D. Utah 1993) and is reprinted at App. 27a-106a. The District Court's pre-trial opinion denying Visa's motion for summary judgment is reported at 801 F. Supp. 517 (D. Utah 1992) and is reprinted at App. 107a-127a.

STATEMENT OF JURISDICTION OF THE COURT

The Court of Appeals for the Tenth Circuit denied rehearing on December 5, 1994. App. 128a. This Court subsequently granted petitioner's motion for an extension of time to file this petition until April 20, 1995. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

STATEMENT OF THE CASE

Overview

This is a "landmark"[1] antitrust case, "widely watched even beyond the banking industry" because of the "significant legal issues it raised."[2] In the decision below the Tenth Circuit validated, as a matter of law, the collective action of the members of the Visa joint venture in enacting a Bylaw that excludes from membership any firms that issue charge cards "deemed competitive" with VISA cards. Visa's Bylaw selectively "deemed competitive" the Discover and

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[1] *Visa Case is Headed for Supreme Court*, Banking Pol'y Rep., Oct. 17, 1994 at 15.

[2] Hansell, *Visa Wins Key Round in Antitrust Suit by Dean Witter*, N.Y. Times, Sept. 24, 1994 at 35.

American Express cards, but not other competing cards issued by Visa's members. Visa invoked the Bylaw to deny membership to Dean Witter, which issues Discover cards.

Following a three-week trial in late 1992, a jury in Salt Lake City, Utah returned a unanimous verdict against Visa under the rule of reason, finding that Visa's exclusion of Dean Witter significantly harms competition in the relevant market.[3] The District Court denied Visa's post-trial motion for judgment as a matter of law or for a new trial. Thereafter the Tenth Circuit reversed, holding that Visa's action was valid as a matter of law. The Tenth Circuit held that Visa, whose members collectively account for more than 70% of the relevant market, lacked market power and that Visa's Bylaw facilitated its business operations by preventing "free riding" by firms that issue their own competing proprietary cards.

The Tenth Circuit's reversal of the District Court's judgment was entirely on legal grounds.

Statement of Facts

The following key facts were introduced at trial. Based on a careful review of the record, the District Court held that the evidence was "reasonable, credible and capable of supporting the verdict reached by the jury." App. 70a.

Petitioner MountainWest Financial Corporation is a federally insured bank in Sandy, Utah owned by Dean Witter, Discover & Co. Respondent Visa U.S.A. Inc. is an industry-wide joint venture, consisting of about 6,000 banks and other financial institutions that issue VISA cards in competition with each other to consumers. R. at

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[3] At trial, the relevant market was defined as consisting of all charge cards that can be used for general purposes at a wide variety of retail establishments, whether or not the cards offer a revolving credit feature. App. 30a n.2. The two leading general purpose cards are VISA and MasterCard cards, which are issued by members of the Visa and MasterCard joint ventures, and are sometimes referred to as "association" cards. In addition, this market includes several "proprietary" cards, meaning cards issued by a single firm. Those proprietary cards are Diners Club and Carte Blanche cards, issued by Citicorp; Discover cards, issued by Dean Witter; and several different American Express cards, issued by American Express.

662-63.[4] The Visa venture itself does not issue VISA cards, but instead provides processing services and establishes rules for its members.

Visa is what is known as a "network" joint venture, meaning that it benefits from network efficiencies and economies of scale that grow as its membership grows. As the use of VISA cards increases, the Visa system becomes more valuable to participating merchants that accept VISA cards. R. at 667-68, 838. Concomitantly, as the number of participating merchants grows, the Visa system's value to its cardholders increases.[5] *Id.*

Apart from the exclusionary Bylaw at issue in this case, Visa membership is open to "[a]ny financial institution which is eligible for federal deposit insurance." App. 4a. Visa has admitted over 1,000 financial institutions into membership since 1988 and continues to admit hundreds of new members annually. R. at M629.

The restraint at issue in this case is an exclusivity requirement set forth in Visa Bylaw 2.06, adopted in 1989: "[I]f permitted by applicable law, [Visa] shall not accept for membership any applicant which is issuing, directly or indirectly, Discover cards or American Express cards, or any other cards *deemed competitive by the Board of Directors*." App. 5a (emphasis added). Visa interprets this provision to apply not only to firms that apply for membership but also to any existing Visa member that might issue its own proprietary

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[4] Record citations to "R. at __" are to the Appendix to Opening Brief of Appellant Visa U.S.A. filed with the Tenth Circuit. Citations to "R. at M__" are to the Supplemental Appendix of Appellee MountainWest filed with the same court, and citations to "R. at MS__" are to that supplemental appendix's Addendum.

[5] The telephone system illustrates how network efficiencies are achieved: the value of a telephone to an individual consumer increases as more people use telephones. In addition to Visa and MasterCard, other joint ventures that generate network efficiencies include automatic teller machine networks and real estate multiple listings services. *See* J. Tirole, *The Theory of Industrial Organization* 404-09 (1990); Katz & Shapiro, *Network Externalities, Competition, and Compatibility*, 75 Am. Econ. Rev. 424 (1985).

card "deemed competitive" by the Visa Board. *Id.* 58a. Visa ultimately codified that interpretation in another Bylaw, 2.10(e), which provides that existing members may not issue proprietary cards in competition with VISA cards. R. at M645-47.

In 1982, seven years before Visa adopted Bylaw 2.06, Dean Witter's then-parent company, Sears, Roebuck and Co., formulated a business strategy to become an aggressive nationwide competitor in the general purpose card market. Sears already was a small issuer of VISA cards through the Sears Savings Bank in California, but Sears determined that it wanted to issue cards nationally and on a much larger scale. R. at 313-15. Sears' model in formulating that business strategy was Citicorp, which at the time was issuing multiple cards nationally—including VISA and MasterCard cards, as well as three proprietary cards: Diners Club, Carte Blanche and Choice. R. at M713-15. Sears concluded that it could compete most efficiently and effectively by pursuing a similar national multi-card strategy in order to span diverse consumer segments. R. at 316-17.

In 1986, Sears (through its Dean Witter subsidiary) introduced the proprietary Discover card, which was positioned as a low-priced competitor in the market. Discover card charged no annual fee, offered an innovative cash-back feature that repaid consumers based on their annual charge volumes, and set interest rates comparable to those offered by other large issuers. R. at 322-23. When Dean Witter introduced the Discover card, it had no reason to believe that it could not pursue the other half of its multi-card strategy—issuing an association card on a national basis—whenever it was ready to do so. R. at 319-21. Visa and MasterCard remained open to all qualified financial institutions, including those that issued proprietary cards. Citicorp, the largest member of Visa and MasterCard, was continuing to pursue a multi-card strategy encompassing two association cards and three proprietary cards. R. at M713, M749-52. Dean Witter's affiliate, Sears Savings Bank, continued as a Visa member to issue a small number of VISA cards. R. at 320.

As soon as Discover card entered the market, Visa "made numerous attempts to limit [its] success." App. 31a. Visa urged its members to make the introduction of the Discover card "more costly and unsuccessful" by, among other things, encouraging them to deny Discover access to transaction processing terminals at merchant

locations. R. at 330-31, 626-27, M279. At one point, Visa adopted a rule barring participating merchants from processing VISA card transactions over terminals developed by Discover. App. 31a. As Visa's vice president of marketing portrayed Visa's strategy:

> [B]y working together, and by being pro-active rather than reactive, I think we can thwart the efforts not only of Sears but of other outside competitors. . . . If we are successful in responding to Sears, then other non-bank competitors who are likely sitting on the sidelines will likely think again when they try to follow Sears' lead. If we are not successful, then there are going to be many more Discovers that we are going to be hearing about in coming years.

R. at M630. Notwithstanding Visa's campaign, the Discover card survived and became a profitable and growing business.

After it became clear that Discover card would remain in the market, Visa tried to convince Dean Witter to eliminate Discover as a competing proprietary card and instead to convert Discover into a VISA card, such as a "Discover VISA" card. R. at M220-49, M684-85. Thus, Visa wanted Dean Witter to become a member, but only on terms that eliminated Discover as a competing proprietary card. R. at 345-47. Dean Witter had no interest in membership on those terms. R. at 347-48.

Dean Witter's experience with the Discover card confirmed Sears' earlier judgment that it was essential to an effective multi-card strategy to be able to issue both proprietary *and* association cards. Research consistently showed that consumers sharply differentiate between Discover and the association cards. While the proprietary Discover card offered the advantage of being completely within Dean Witter's control, it lacked the universal acceptance (by merchants and consumers) that VISA and MasterCard cards enjoy because they are offered by most financial institutions. R. at 329, 687-88, M730-31. As a result, virtually all consumers who carry the Discover card also carry either a VISA or MasterCard card. (Conversely, many consumers who carry an association card do not also carry a Discover card.) R. at M608-26. In order to offer a card to replace the existing VISA and MasterCard cards in consumers' wallets, Dean Witter needed to be able to offer association cards as well. This multi-card strategy, already being employed by Citicorp, would allow Dean

Witter to maximize its scale economies and to compete more directly and effectively against existing issuers of VISA and MasterCard cards. R. at 687-89, 749-54, 1549-68, M281-339, M703-04, M712.

In late 1988, Dean Witter applied for Visa membership through Greenwood Trust Company, a bank owned by Dean Witter. R. at 334-35. Although Greenwood Trust met all existing requirements for membership in Visa, its application was rejected by Visa's Board of Directors.[6] R. at 338-39. At the same Board meeting, held on June 5-6, 1989 in Cannes, France, Visa's Board voted unanimously to adopt the selective exclusivity requirement of Bylaw 2.06. R. at 1583-84. Visa adopted the Bylaw because its members feared that admission of Dean Witter, which had aggressively priced and marketed its Discover card and which was regarded as a maverick in the industry, would exert downward pressure on their prices and profit margins. R. at 340-41, M792-94. As Citicorp's Visa Board representative explained his vote against Dean Witter: "Discover card was a very effective price competitor, and had been very successful and [I] did not want to encourage that kind of price competition within Visa." R. at 340-41.

In addition, Visa intended that its exclusion of Dean Witter serve as a warning to deter other firms from introducing new competing proprietary cards. At the same Board meeting in which Bylaw 2.06 was adopted, the Visa Board instructed management to compile a list of other non-bank firms capable of introducing a new competing proprietary card. R. at M490-514, M689-94. The resulting list named more than 100 non-bank firms (including General Motors, Ford, Chrysler, Shell Oil, Amoco Oil, and AT&T) that were deemed to have the *potential* to issue competing proprietary cards. The Visa Board instructed that all of those firms, many of which were then Visa members, be monitored and either expelled or excluded if they became *actual* issuers of cards "deemed competitive" by Visa's Board. R. at M689-94, M742-43.

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[6] The minutes of the Visa Board of Directors meeting recorded that Greenwood Trust's membership was denied because "Greenwood Trust Company is the issuer of Discover cards and has no intention of converting that program; rather they intend to issue both Discover cards and VISA cards." R. at 1583-84.

As a result of Bylaw 2.06, no firm—other than Citicorp—is free to pursue the efficient and competitively effective multi-card strategy that Dean Witter sought to deploy. Visa members that otherwise would have an interest in issuing proprietary cards on the proprietary networks established by Dean Witter and American Express cannot pursue that strategy while remaining in the Visa venture. Nor, for the same reason, can Visa members create their own proprietary networks. Further, all other firms that are *potential* entrants in the charge card market are forced to choose between issuing association cards or a proprietary card. Under these circumstances, no firm has pursued a new proprietary card strategy since Bylaw 2.06 was adopted. R. at 1055-57, M693-94. Indeed, Dean Witter's chief executive officer testified at trial that Dean Witter would not have introduced its proprietary Discover card had it known the exclusionary penalty that Visa would impose on it as a result. App. 75a.

In 1990, Dean Witter purchased the assets of MountainWest's predecessor, a savings and loan in Salt Lake City, Utah that was already a Visa member and was issuing a small number of VISA cards. R. at 164-78, M664-65. Dean Witter sought to use MountainWest to move forward on its multi-card strategy by issuing an association card on a national basis. Dean Witter determined that MountainWest would offer a new, aggressively promoted and low-priced "Prime Option" VISA card to consumers throughout the United States.[7] R. at 349, M734-35. Visa's large issuers recognized that a large-scale, low-priced entry like Prime Option would have a significant impact in the market. R. at M792-94, MS10, MS53. Indeed, one of Visa's experts testified that for each one percentage

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[7] Prime Option VISA contemplated a 25-day grace period without charge, carried a reduced interest rate on current purchases and set an opening credit line of $3500. R. at M666-69. The interest rate on Prime Option VISA was to be 9.9% on each purchase for the first 60 days that the purchase was outstanding and 9.9% plus the prime interest rate (then 6%) thereafter. R. at M667-69. There was to be no annual fee charged to any cardholder. R. at M667. At the time of trial, the average interest rate charged on VISA and MasterCard cards was about 18%, and the average annual fee was about $17. R. at 1463-64.

point drop in average charge card interest rates, consumers would save nearly two billion dollars annually. R. at M768-71.

Upon learning of Dean Witter's involvement in MountainWest, Visa refused to permit the issuance of Prime Option VISA, citing its Bylaw 2.06. App. 33a. MountainWest then filed suit, contending that Visa's Bylaw constitutes a concerted refusal to deal and an unreasonable restraint of trade in violation of Section 1 of the Sherman Act. *Id.*

District Court Proceedings

After a three-week trial, the jury returned a unanimous verdict against Visa. Pursuant to special interrogatories, the jury found that Visa violated Section 1 of the Sherman Act by adopting Bylaw 2.06 and applying it against Dean Witter. App. 37a-38a. The jury specifically found that: (i) Bylaw 2.06 "has a substantially harmful effect on competition in the relevant market;" (ii) this harmful effect "substantially outweighs any beneficial effect on competition in the relevant market;" and (iii) Dean Witter "was injured by Visa's Bylaw 2.06." *Id.*

After trial, Visa moved for judgment as a matter of law and alternatively for a new trial. Carefully evaluating the record evidence, the District Court (Dee Benson, J.) declined to set the verdict aside. The court found substantial evidence that Visa members, when acting collectively through the joint venture, have market power in the relevant market. App. 45a. The court further found that Bylaw 2.06 constitutes an exercise of that market power in order to exclude selected competitors with the effect of maintaining higher prices. *Id.* 72a-75a. Noting that Visa members collectively have a market share exceeding 70%[8] and that the Bylaw "shields current Visa members from vigorous competition," the court rejected Visa's argument that no reasonable jury, as a matter of law, could have found that Bylaw 2.06 substantially harmed competition in the relevant market. *Id.* 73a-76a. Instead, the court held that,

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[8] The collective charge volume of the Visa system alone constitutes 45.6% of the relevant market. Additionally, the District Court found that "[t]he evidence also showed that Visa members, through their membership in the MasterCard association, control an additional 24.6% of the market—for a total of [over 70%]." App. 45a.

based on the evidence, it was reasonable for the jury to conclude that Bylaw 2.06 harmed competition both by "preventing [Dean Witter's] low-cost Prime Option VISA card from entering the market, and by creating a disincentive for the creation of new proprietary cards." *Id.* 75a.

Finally, the District Court rejected Visa's arguments that Bylaw 2.06 was procompetitive as a matter of law. As to Visa's claim that Bylaw 2.06 was essential to protect the "incentives for the creation and maintenance of joint venture property"—*i.e.*, to prevent so-called "free-riding"—the court found that the jury either had "simply discredited the evidence presented" by Visa on this issue, or had found "the benefits to competition were outweighed by the harmful effects" of the Bylaw. App. 77a. Either way, "it was the jury's prerogative to weigh the evidence." *Id.*

The Tenth Circuit's Decision

The Court of Appeals (Moore, J.; Seth, Sr. Cir. J.; Daugherty, Sr. D. J.) set aside the District Court's judgment and nullified the jury verdict against Visa entirely on legal grounds. The court held that market power was a threshold "screen" for analyzing whether Visa's exclusionary Bylaw should be subject to full factual scrutiny under the rule of reason, App. 13a, and that Visa's 6,000 issuer members, although representing over 70% of the relevant market, lacked market power when acting collectively because the Bylaw did not entirely exclude Dean Witter from the relevant market. *Id.* 17a-19a. In addition, the court accepted, again as a matter of law, Visa's asserted justification that its exclusionary Bylaw was "reasonably related to Visa USA's operation" because it prevented "free riding" on Visa by members that would compete against the Visa venture with their own proprietary cards. *Id.* 21a.

Dean Witter's timely petition for rehearing and suggestion for rehearing en banc were denied without comment on December 5, 1994. App. 128a.

REASONS FOR GRANTING THE WRIT

It has been nearly a decade since the Court decided the last of four cases involving challenges to restraints of trade imposed collectively by joint ventures.[9] In those cases, the Court clarified that arrangements among competitors acting through a joint business entity to create new products or to achieve integrative efficiencies are generally to be evaluated under the rule of reason. "Unfortunately, however, the Court never explained in these cases exactly how the rule of reason analysis should be conducted." Piraino, *Reconciling Competition and Cooperation: A New Antitrust Standard for Joint Ventures*, 35 Wm. & Mary L. Rev. 871, 892 (1994). As a result, the lower courts have struggled over the past decade to apply the rule of reason in joint venture cases, and their decisions reflect pervasive division and confusion. The Tenth Circuit's opinion, which upholds as a matter of law Visa's requirement that no Visa member or applicant may issue a proprietary card "deemed competitive" with VISA cards, squarely presents two central features of the rule of reason analysis that have troubled and divided the lower courts.

First, the Tenth Circuit's ruling deepens a three-way split among the circuits regarding the standard for determining whether joint venture restraints are ancillary.[10] The circuits have formulated three different and incompatible rules that range from (1) the Tenth Circuit's permissive formulation that the restraint need only be reasonably related to the joint venture's business operations; to (2) the more exacting rule that the restraint must be reasonably

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[9] *See Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979) ("*BMI*"); *NCAA v. Board of Regents of the Univ. of Oklahoma*, 468 U.S. 85 (1984); *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985); *Federal Trade Comm'n v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986).

[10] Under this Court's precedents, restraints of trade that are not properly considered ancillary may be condemned without extensive further inquiry, and in some cases may even warrant *per se* condemnation. *See, e.g., NCAA*, 468 U.S. at 106-10; *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 356-57 (1982). By contrast, restraints that are judged to be ancillary receive more liberal treatment under the rule of reason. *See, e.g., BMI*, 441 U.S. at 20-24.

necessary to enhance the joint venture's efficiencies; to (3) the strictest rule that the restraint must be the least restrictive alternative to enhance those efficiencies. The Tenth Circuit's permissive formulation caused it to ignore that Visa's Bylaw creates no efficiencies and instead harms consumers and competition. This case thus illustrates the importance of requiring that a joint venture restraint contribute to the venture's efficiencies in order to be deemed ancillary.[11]

Second, the Tenth Circuit's opinion compounds yet another three-way split among the circuits, this time regarding the proper threshold showing of market power, if any, that must be made to challenge a joint venture restraint under the rule of reason. The Tenth Circuit held that the collective market share of Visa and its members is irrelevant and instead required Dean Witter to make a threshold showing that it was being excluded entirely from the relevant market. In the absence of such a showing, the court held, Dean Witter could not—as a matter of law—maintain a challenge to Visa's exclusionary conduct. This holding conflicts with lower court decisions that have held that market power is only one factor in the rule of reason analysis, and thus that no market power threshold, or "screen," is appropriate. It further conflicts with other decisions that have required a threshold showing that the venture members have a substantial collective market share and the ability to disadvantage competitors, but that have not imposed a heightened requirement that exclusion from the venture effectively entails exclusion from the relevant market.

The Tenth Circuit's market power analysis likewise conflicts with this Court's consistent holdings that disadvantaged firms may challenge exclusionary conduct even though they remain viable, albeit less effective, competitors in the relevant market. By improperly focusing on the ability of a single competitor to remain in the market, rather than on the adverse impact on competition

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[11] On this and other issues, the Tenth Circuit purports to follow but actually contradicts key aspects of the D.C. Circuit's *Rothery* opinion. *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986) (Bork, R. Ginsburg, Wald concurring), *cert. denied*, 479 U.S. 1033 (1987).

caused by an exclusionary restraint, the Tenth Circuit disregarded and undermined this Court's frequent admonition that the antitrust laws protect competition, not competitors.

Still further, both the Tenth Circuit's ancillarity and market power analyses conflict with recent antitrust enforcement guidelines issued by the Department of Justice and Federal Trade Commission that focus, in large measure, on the acceptable limits of joint venture conduct.

This conflict and confusion is particularly unfortunate because of the growing importance of joint ventures in the American economy. As Peter Drucker recently noted, "the greatest change in corporate structure—and in the way business is being conducted—may be the accelerating growth of relationships based not on ownership but on partnership: joint ventures; minority investments cementing a joint-marketing agreement or an agreement to joint research; semi formal alliances of all sorts." Drucker, *The Network Society*, Wall St. J., March 29, 1995 at A12. The kind of joint venture at issue here—one that engages in "network" activities—has become especially important in light of the rapid changes in technology that are occurring throughout the economy. These changes have the potential to facilitate business transactions in a wide variety of fields, including information services, communications, financial services and health care. But that potential can be realized only if the legal standards governing joint ventures are clear and reflect a proper understanding of the ways in which such ventures serve the interests of consumers.

In sum, there is a pressing need for authoritative resolution by the Court of the two issues presented by this case.

I. THE TENTH CIRCUIT DECISION CONFLICTS WITH OTHER CIRCUITS BY VALIDATING AS ANCILLARY A JOINT VENTURE'S COUNTER-EFFICIENT AND HENCE NAKED RESTRAINT OF TRADE.

In its quartet of joint venture cases decided since 1979, the Court never encountered a suitable opportunity to provide adequate antitrust guidance regarding how, under the rule of reason, a joint venture's restraint of trade must relate to the venture's efficiencies. While the

Court noted in *BMI* and *Northwest Wholesale Stationers* that a restraint that may "increase economic efficiency" should be subjected to rule of reason—and not *per se*—analysis, *see* 441 U.S. at 19-20; 472 U.S. at 294-95, the Court's remands in those two cases prevented actual application of that analysis. Similarly, the restraint struck down in *NCAA* required no more than the comment that it was "not even arguably tailored to serve" its asserted purpose. *See* 468 U.S. at 119. Finally, in *Indiana Federation of Dentists*, the Court faced a restraint that not even its proponents claimed possessed "competitive virtue." *See* 476 U.S. at 459-60. Thus, while these decisions have suggested to many lower courts that they should pay some attention to the connection between a restraint and the venture's efficiencies, the decisions have not provided any real guidance about the legal standard that should be applied. *See, e.g., In re Detroit Auto Dealers Ass'n, Inc.*, 955 F.2d 457, 472 (6th Cir.) (application of rule of reason to horizontal restraints is "murky and unclear"), *cert. denied*, 113 S.Ct. 461 (1992). As a result, there are deep divisions among the lower courts that the Tenth Circuit's ruling both typifies and exacerbates.

A. The Lower Courts Are Mired in a Three-Way Split on the Proper Test for Distinguishing Between "Ancillary" and "Naked" Restraints of Trade.

Nearly a century ago, Judge (later Chief Justice) Taft's seminal opinion in *Addyston Pipe* drew a sharp distinction between ancillary and naked restraints of trade under the Sherman Act. *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211 (1899). According to Taft, restraints are ancillary when they are incidental to and enhance the procompetitive purposes of a legitimate joint enterprise. 85 F. at 280-83. By contrast, restraints are naked when they do nothing more than eliminate competition.

In 1986, the D.C. Circuit's *Rothery* decision recast Judge Taft's classic formulation into modern economic terms by focusing on a restraint's contribution to a venture's efficiency as the key to contemporary antitrust analysis. As the *Rothery* court explained:

> To be ancillary, . . . an agreement eliminating competition must be subordinate and collateral to a separate, legitimate transaction. The ancillary restraint is subordinate and

> collateral in the sense that it serves to make the main transaction more effective in accomplishing its purpose. Of course, the restraint imposed must be related to the efficiency sought to be achieved. If it is so broad that part of the restraint suppresses competition without creating efficiency, the restraint is, to that extent, not ancillary.

792 F.2d at 224.

In upholding Visa's exclusionary Bylaw in this case, however, the Tenth Circuit applied a more permissive test for separating "ancillary" and "naked" restraints. Rather than examining whether the challenged restraint contributes "to the efficiency of a contract integration," *Rothery*, 792 F.2d at 229, the court asked only whether "the alleged restraint is *reasonably related to Visa USA's operation* and no broader than necessary to *effectuate the association's business*." App. 21a (emphases added). Signally, this formulation is satisfied even though a restraint creates no efficiencies but merely increases member profits by reducing competition.

The court purported to quote and follow *Rothery's* formulation that the Bylaw must be "'subordinate and collateral . . . [making] the main transaction more effective in accomplishing its purpose,' which is to provide credit card services to its members." App. 21a (*quoting Rothery*, 792 F.2d at 224). But the Tenth Circuit's cropped quote cut off the key qualification that *Rothery* had added immediately thereafter: "Of course, the restraint imposed *must be related to the efficiency sought to be achieved*. If it is so broad that part of the restraint suppresses competition *without creating efficiency*, the restraint is, to that extent, not ancillary." *Rothery*, 792 F.2d at 224 (emphases added).

Rothery's requirement that an ancillary restraint contribute to the venture's efficiency, not just to the business interests of the venture or its members, is critical. A joint venture's business interest lies in maximizing its members' profits, even by means that are inefficient or anticompetitive. The requirement that members use the joint venture to pursue profits only *through gains in efficiency* ensures that collateral restraints will be output-expanding and thus will benefit consumers. This is precisely the distinction recognized by the Seventh Circuit in *Premier Electrical Construction Co. v. National Electrical Contractors Association, Inc.*, 814 F.2d 358 (7th Cir.

1987), which struck down a restraint that increased defendants' profits but served no efficiency-enhancing function. The Seventh Circuit explained that where producers merely seek to reduce price competition among themselves, they "destroy the power" of a "free riding" justification because there is no "alignment of interests" between the producers and consumers as the restraint has no "potential to create the efficient production that consumers value." *Id.* at 369-70.

In sharp contrast to the Seventh Circuit in *Premier Electrical*, the Tenth Circuit in this case failed to draw this crucial distinction between the pursuit of profits generally and the pursuit of profits through gains in efficiency. Instead, as explained more fully in Section I (B), the court accepted as a matter of law Visa's argument that its members should be able to deny a competitor the benefits of venture membership *even though* the Visa joint venture's efficiency would have been enhanced by the admission of Dean Witter as a new member, and *even though* Visa's reason for selectively excluding this competitor was "to discourage price competition." *See* App. 21a. By not requiring Visa to explain how its restraint of trade contributed to the efficiency of the Visa network, the Tenth Circuit improperly permitted the venture to protect its members' profits at the expense of consumers.[12]

The Tenth Circuit's permissive standard follows similar authorities that likewise failed to distinguish between the pursuit of profits and the pursuit of profits through gains in efficiency. As FTC Chairman Robert Pitofsky has noted, "courts and commentators" analyzing joint ventures "at times have overlooked . . . whether the restrictions inherent in the joint venture are reasonably related to achieving efficiencies." Pitofsky, *A Framework for Antitrust Analysis of Joint Ventures*, 74 Geo. L.J. 1605, 1620 (1986). *See also id.* at 1614 ("Courts and commentators have rarely examined the

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[12] *See generally* Hovenkamp, *Exclusive Joint Ventures and Antitrust Policy*, 1995 Colum. Bus. L. Rev. 1 (forthcoming Summer 1995) (explaining why profit motive of joint venture participants may lead them to exclude from membership an especially aggressive or efficient firm whose membership would contribute to the venture's efficiency but would enable the firm to compete more effectively against existing members).

level of integration, or the likely levels of efficiency, of particular joint ventures. Once the arrangement was 'characterized' as a joint venture and not a cartel—that is, it was found that some integration was present—it has been *assumed* that substantial efficiencies were involved.") (emphasis added). Notable circuit opinions that presaged the Tenth Circuit in making this fundamental error include *Edwin K. Williams & Co., Inc. v. Edwin K. Williams & Co.-East*, 542 F.2d 1053, 1061 (9th Cir. 1976) (territorial division between potential competitors upheld as "reasonable" means of furthering the "legitimate purpose" of protecting property from the effects of competition), *cert. denied*, 433 U.S. 908 (1977) and *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1249 (3d Cir. 1975) (restriction upheld as not "'exceed[ing] the outer limits of restraint reasonably necessary to protect the defendant'" in its "business purpose") (citation omitted).

The Tenth Circuit's rule squarely conflicts with *Rothery* and with other decisions that focus on efficiency and consumer welfare. *See, e.g., In re Detroit Auto Dealers Ass'n, Inc.*, 955 F.2d at 470-72 (upholding FTC ruling that agreement between competitors to limit hours of operation violated rule of reason based on FTC analysis that restraint lacked "a 'plausible' efficiency justification"); *Polk Bros., Inc. v. Forest City Enterprises, Inc.*, 776 F.2d 185, 189 (7th Cir. 1985) ("A restraint is ancillary when it may contribute to the success of a cooperative venture that promises greater productivity and output.").

The Tenth Circuit is likewise in direct conflict with the current antitrust enforcement guidelines of the Justice Department and the Federal Trade Commission, which require that joint venture exclusionary restraints be justified based on efficiencies. For example, the guidelines directed at the health care industry—which is replete with joint ventures and cooperative provider alliances—state that "collateral agreements" in diverse situations must be "reasonably necessary to achieve the efficiencies sought by the joint venture." U.S. Department of Justice & Federal Trade Commission, *Statements of Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust*, 67 Antitrust & Trade Reg. Rep. at S-18 (Sept. 29, 1994 Supp.) ("*1994 Health Care Guidelines*"). The same efficiency prerequisites also pervade the recently issued intellectual

property guidelines. U.S. Department of Justice & Federal Trade Commission, *Antitrust Guidelines for the Licensing of Intellectual Property*, 68 Antitrust & Trade Reg. Rep. at S-11 (April 13, 1995 Supp.) ("*1995 Intellectual Property Guidelines*") (examining whether "restraint in a licensing arrangement" is "reasonably necessary to achieve procompetitive efficiencies"); *id.* at S-14 ("collective price or output restraints . . . may be deemed unlawful if they do not contribute to an efficiency-enhancing integration of economic activity among the participants").[13] The Tenth Circuit undercuts the purpose of these guidelines by deepening the legal conflict and confusion surrounding joint venture ancillary restraints.

The Tenth Circuit's permissive rule of "ancillarity" conflicts further with an even stricter test applied by other courts, which validates restraints as ancillary *only* if no "less restrictive alternative" exists to achieve the purpose of "mak[ing] the joint activity more efficient." *Sullivan v. National Football League*, 34 F.3d 1091, 1102-03 (1st Cir. 1994), *cert. denied*, 115 S.Ct. 1252 (1995). *See also Los Angeles Memorial Coliseum Comm'n v. National Football League*, 726 F.2d 1381, 1396 (9th Cir.) (same), *cert. denied*, 469 U.S. 990 (1984); *North Am. Soccer League v. National Football League*, 670 F.2d 1249, 1261 (2d Cir.) (same), *cert. denied*, 459 U.S. 1074 (1982). Notably, these decisions have been criticized as too intrusive. *See, e.g., North Am. Soccer League*, 459 U.S. at 1079 (Rehnquist, J., dissenting from denial of certiorari) (noting disagreement among lower courts and questioning the "least restrictive alternative analysis"); *American Motor Inns*, 521 F.2d at 1249 ("'less restrictive alternative'" test puts "undue burden on the ordinary conduct of business" by requiring courts to "second-guess [ ] business judgments").

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[13] An efficiency-based formulation was also presented by the Solicitor General's *amicus curiae* brief for the United States in the *NCAA* case, which invalidated a naked restraint on output imposed by an educational membership association. The Solicitor General argued that "it is not enough that a restraint accompanies an otherwise legitimate cooperative activity," for the restraint must also be "reasonably necessary to achieve such efficiencies." Brief for the United States at 11 n.9, *NCAA v. Board of Regents of the Univ. of Oklahoma*, 468 U.S. 85 (1984) (No. 83-271).

B. The Tenth Circuit's Permissive Test Led It to Approve, as a Matter of Law, a Counter-Efficient Restraint of Trade.

This case compellingly illustrates the importance of requiring that ancillary restraints contribute to a joint venture's efficiency and not merely to the business interests of the venture or its members. By excluding a firm that would have expanded output both within and outside the venture and would have spurred increased price competition, Visa's Bylaw 2.06 serves the interest of Visa's members in maximizing their profits while reducing, not enhancing, the venture's efficiency. In this case, once analysis under the rule of reason established that Visa's Bylaw restrained competition without any efficiency justification, the Bylaw should have been struck down as a matter of law as a "naked" restraint of trade.[14]

Had the Tenth Circuit focused on the relationship between the challenged restraint and Visa's efficiency, it would have readily determined that Visa's Bylaw is counter-efficient and, thus, not ancillary. As explained above, Visa benefits from network efficiencies and economies of scale that grow as Visa's membership grows. In order to take advantage of these efficiencies, Visa—except for this exclusionary Bylaw—uniformly follows an open membership policy. While each new member may, especially in the short term, compete against and harm some individual existing *members*, each new addition enhances the efficiency of the Visa *venture*. Any abrupt and selective change in Visa's open membership policy—like its exclusionary Bylaw—is therefore immediately suspect from a competitive standpoint, because it is facially counter-efficient. *See, e.g.*, H. Hovenkamp, *Economics & Federal Antitrust Law* § 10.3, at 283-85 (1985); P. Areeda & H. Hovenkamp, *Antitrust Law* § 736.1 (1994 Supp.); Carlton & Salop, *You Keep on Knocking But You Can't Come In: Evaluating Restrictions on Access to Input Joint Ventures*,

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[14] Dean Witter accordingly moved for judgment as a matter of law at the close of evidence on the basis that Bylaw 2.06 was counter-efficient and thus unlawful under the rule of reason. R. at M811-15. The District Court declined to so hold as a matter of law and submitted the case to the jury, which unanimously endorsed Dean Witter's claim as a matter of fact.

Working Paper No. 111, Center for the Study of the Economy and the State, The University of Chicago 15-18 (April 1995).

In Visa's case, these suspicions are underscored by the related Bylaw provision, 2.10(e), which threatens to expel any existing Visa member that issues a proprietary card "deemed competitive" by Visa. As a result of these twin restrictions, no firm—other than Citicorp—may issue both a VISA card and a proprietary card. The consequent reduction in output and curtailment of consumer choice, which sacrifice the venture's efficiencies in order to squelch competition from proprietary cards issued by Visa members, is a textbook "naked" restraint. *See, e.g., NCAA*, 468 U.S. at 106-10 (joint venture restraints that merely reduce output and narrow consumer choice are "naked").

Because the Tenth Circuit examined only whether Visa's restraint reasonably serves the business interest of the venture or its members, however, the court felt free to disregard the Bylaw's obviously counter-efficient nature. Instead, the court accepted at face value Visa's assertion that it is preventing "free riding" by a competitor in order to avoid the "added costs" that Dean Witter would impose "by taking advantage of a brand and operating systems that it not only had done nothing to create but had chosen to compete against." App. 23a. The court thereby ignored that, in order to enhance its efficiency as a network venture, Visa continues to admit every year hundreds of new members that "have done nothing to create" the venture's brand. Not surprisingly, the court did not identify any "added costs" that were unique to Dean Witter or were not covered by the fees that Visa customarily charges its members, old and new, most of which also issue competing MasterCard cards.[15] *Id.*

The speciousness of Visa's supposed concern about "free riding" is further highlighted by Visa's selectivity in targeting its exclusionary Bylaw. By its terms, Visa's rule applies only to those

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[15] *Cf. Chicago Professional Sports Ltd. Partnership v. National Basketball Ass'n*, 961 F.2d 667, 675 (7th Cir.) ("What gives this the name *free*-riding is the lack of charge . . . . When payment is possible, free-riding is not a problem because the 'ride' is not free.") (emphasis in original), *cert. denied*, 113 S.Ct. 409 (1992).

firms that the Visa Board chooses to "deem competitive." Visa claims that Dean Witter has been so "deemed" because of its proprietary Discover card. Yet the Visa Board has not targeted Citicorp, which continues to be the largest issuer of VISA and MasterCard cards, even though Citicorp issues *two* competing proprietary cards, Diners Club and Carte Blanche. If there were a genuine "free riding" problem associated with VISA card issuers also issuing proprietary cards, then Citicorp—which itself was a "latecomer" that joined Visa years after the venture's formation (R. at M747)—would have been excluded or expelled from Visa years ago.

The Tenth Circuit also acknowledged, without explicitly accepting, Visa's argument that by preventing selected competitors from "free riding," Visa was actually promoting "intersystem competition" against itself. App. 20a. This argument should have been rejected as legally deficient, both as unrelated to any Visa efficiencies *and* as irrational on its face. Firms do not take actions for the purpose of strengthening their competitors. In this case, it is not credible (as the jury surely perceived in rejecting this defense) that the Visa Board, composed of astute financial executives, enacted the exclusionary Bylaw for the purpose of empowering other card systems to compete more effectively against Visa. *Cf. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-89, 594 n.19 (1986) (rejecting "economically irrational" theories as a matter of law). Moreover, Visa gave the lie to this argument when it invited Dean Witter into the Visa venture so long as Dean Witter agreed to convert the Discover card to a VISA card (R. at M220-49, M684-85), which would have reduced intersystem competition. That was Visa's purpose in issuing the invitation.

The dangerous legacy left by the Tenth Circuit's ancillarity analysis, if unchecked by this Court, is manifest. One recent guide to business planning along the information superhighway relied exclusively on the Tenth Circuit's decision in this case to opine that "it is logical for joint venture partners to exclude nonparticipants from the benefits of the venture," and lauded the Tenth Circuit for allowing Visa to exclude a firm that would have "increase[d] costs to Visa members unfairly." Perritt, *Access to the National Information Infrastructure*, 30 Wake Forest L. Rev. 51, 81-83 (1995). But these

views are pernicious. As this case starkly illustrates, the pursuit of profits through the exclusion of a low-cost producer does not aid consumers and competition. The Court should grant the writ in order to hold that joint venture restraints are ancillary only if they benefit consumers by enhancing the venture's efficiency.

II. THE TENTH CIRCUIT DECISION CONFLICTS WITH OTHER CIRCUITS AS TO THE ROLE AND DEFINITION OF MARKET POWER IN EVALUATING A JOINT VENTURE'S RESTRAINT OF TRADE UNDER THE RULE OF REASON.

Although the Court considered several joint venture restraint cases in the mid-1980's that raised issues relating in some way to market power, the Court has not had a suitable opportunity to address an important and recurring issue that has divided and perplexed the lower courts: the proper role and definition of market power in evaluating joint venture restraints of trade under the rule of reason.[16]

As a result, the lower courts have struggled with whether and how market power should be used to distinguish joint venture restraint cases that require extensive factual scrutiny from those that can be resolved more quickly. Some courts have treated market power as an important factor under the rule of reason, but not as a dispositive threshold requirement. Other courts have said that market

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[16] In *NCAA*, the Court invalidated a joint venture's collective membership restriction, stating that although the association *had* market power, even "absence of proof of market power does not justify a naked restriction on price or output." 468 U.S. at 109. Shortly thereafter, the Court unanimously held in *Northwest Wholesale Stationers* that "some showing" that a joint entity either possessed collective market power or was "essential to effective competition" is a "threshold" element in determining whether to subject an entity's collective expulsion of a member to *per se* condemnation. *See* 472 U.S. at 295-97. One year later, the Court unanimously invalidated a collective restraint by a joint membership association and held that, even when a restraint is not "naked" enough to obviate a market power showing under *NCAA*, no "detailed market analysis" is required where there is actual proof of detrimental anticompetitive effects. *See Indiana Fed'n of Dentists*, 476 U.S. at 460.

power should be a threshold "screen" used to dispose of cases without lengthy analysis, and have looked to the collective market share of the venture and its members and their ability to disadvantage competitors in order to apply the screen. Still other courts have said that there should, indeed, be a market power screen but have applied an elevated standard, which treats collective market share as irrelevant and requires a showing that exclusion from the venture effectively excludes the plaintiff entirely from the relevant market.[17]

These three sets of cases are fundamentally at odds with one another and have provoked considerable confusion and controversy among the lower courts. According to the Eleventh Circuit, whether courts "must weigh the market power of the antitrust defendant is a curiously confused and uncertain area of the law." *National Bancard Corp. v. Visa U.S.A., Inc.*, 779 F.2d 592, 603 (11th Cir.), *cert. denied*, 479 U.S. 923 (1986). According to the Second Circuit's recent assessment, the "precise role that market power plays" under the rule of reason remains "a matter of some dispute." *Capital Imaging Assocs., P.C. v. Mohawk Valley Medical Assocs., Inc.*, 996 F.2d 537, 546 (2d Cir.), *cert. denied*, 114 S.Ct. 388 (1993). This case presents an opportunity for the Court to resolve these conflicting precedents because it squarely raises the question of what, if any, threshold showing of market power must be made to challenge a joint venture's restraint of trade under the rule of reason.

The Second Circuit's decision in *Capital Imaging* is one example of a case that treats defendants' market power as important, but not as a dispositive threshold requirement, under the rule of reason. *See* 996 F.2d at 537. There the court held that market power

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[17] These clashing antitrust formulations, rooted in different beliefs about the economic premises of the Sherman Act, are sometimes found in separate opinions in the very same case. *Compare Rothery*, 792 F.2d at 217 & n.3 (analysis "might begin and end" with defendants' small collective market share), *with id.* at 230-32 (Wald, J., concurring) (expressing concern about use of market power "as the exclusive filtering-out device for all potential violators that do not command a significant market share," and stating that "market power is an important consideration; I am not yet willing to say it is the only one," pending more definitive Supreme Court guidance).

is a "highly relevant factor" in joint venture restraint cases but is not "the *sine qua non* of antitrust liability." *Id.* at 546. The Third Circuit has likewise refused to treat market power as determinative, stating that under the rule of reason a defendant must "promulgate 'some competitive justification' for the restraint, 'even in the absence of detailed market analysis.'" *United States v. Brown Univ.*, 5 F.3d 658, 669 (3d Cir. 1993) (citation omitted).

By contrast, the second group of joint venture restraint cases holds that market power *should* be used as a dispositive screen. This group, in applying its screen, focuses on the collective market share of the venture and its members and their ability to disadvantage competitors. *See, e.g., Oksanen v. Page Memorial Hosp.*, 945 F.2d 696, 709 (4th Cir. 1991) (en banc) (dismissing Section 1 claim for lack of market power where defendants possessed only 5.2% share of relevant market), *cert. denied*, 502 U.S. 1074 (1992); *Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566, 1580 (11th Cir. 1991) ("threshold question of market power" focuses on collective market share and competitive significance of venture), *cert. denied*, 113 S.Ct. 295 (1992); *Rothery*, 792 F.2d at 220 (dismissing Section 1 claim for lack of market power where defendants possessed 6% market share); *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1373-74 (5th Cir. 1980) (multilist organization crossed market power "threshold" where its members "constitute[d] a vast majority" of brokers in the market and membership conferred competitive advantage). Under these cases, if there is no market power, a venture's restraints either are immune from antitrust scrutiny or are at most subject to an "abbreviated inquiry."

The cases in this second category reason that restraints imposed by a venture with a small collective market share are generally not of antitrust concern because such restraints are unlikely to have an adverse impact on competition. *See, e.g., Oksanen*, 945 F.2d at 709 (absent "market power, any restraint on trade created by the defendants' [exclusionary] actions is unlikely to implicate section one"). By contrast, restraints imposed by a venture that possesses a large collective share and the ability to disadvantage competitors can cause competitive harm and thus warrant close rule of reason scrutiny. For example, a venture whose members possess a large collective market share often confers a "significant competitive

advantage" on its members such that those excluded from the venture are rendered less effective in the marketplace. *See, e.g., Realty Multi-List*, 629 F.2d at 1370-71 (firm may "be more aggressive and willing to accept a lower" price if it has access to the network); *Thompson*, 934 F.2d at 1580 (same). In addition, if a venture and its members possess a large collective share, the remaining competition outside the venture is limited and is unlikely to be significant enough to overcome the anticompetitive impact of the venture's restraints. *See, e.g., Rothery*, 792 F.2d at 217. Thus, these cases call for careful rule of reason scrutiny where a venture with a large collective market share imposes restraints that target particularly efficient or aggressive competitors for exclusion or that legislate the terms on which competition takes place among the venture's members. *See generally* Hovenkamp, *Exclusive Joint Ventures and Antitrust Policy*, *supra* (discussing importance of collective power in joint venture exclusion cases).

There is yet a third distinct approach that applies an elevated threshold market power requirement in cases that involve exclusion from joint venture membership. These decisions treat the collective market share of the venture as irrelevant and instead focus on whether the plaintiff can show that exclusion from membership effectively excludes it entirely from the relevant market. *See, e.g., Sanjuan v. American Bd. of Psychiatry & Neurology, Inc.*, 40 F.3d 247, 251 (7th Cir. 1994) (denial of certification by nationwide professional group did not meet threshold market power requirement where "plaintiffs already are sellers in the market [and] turning down their applications for certification does not remove their output from the market"). *See also Phil Tolkan Datsun, Inc. v. Greater Milwaukee Datsun Dealers' Advertising Ass'n*, 672 F.2d 1280, 1287-89 (7th Cir. 1982) (dismissing rule of reason challenge as a matter of law, in part, because plaintiff's "continued economic viability [was not] threatened by the challenged membership decision"); *Marrese v. American Academy of Orthopaedic Surgeons*, 706 F.2d 1488, 1492, 1495-97 (7th Cir. 1983) (Posner, J.) (where party excluded from large joint venture remains in the market after exclusion, it cannot "ask the trier of fact to draw an inference" of effect on price or output), *modified on other grounds*, 726 F.2d 1150 (7th Cir. 1984) (en banc),

rev'd on other grounds, 470 U.S. 373 (1985).[18] *See also* Baker, *Compulsory Access to Network Joint Ventures Under the Sherman Act*, 1993 Utah L. Rev. 999, 1105 (proposing that plaintiffs be required to make an "essential facilities" showing in cases challenging exclusion from network joint ventures).

The Tenth Circuit here adopted this heightened standard and held that unless Dean Witter could prove that its exclusion from the Visa venture effectively entails exclusion from the relevant market, Visa's exclusionary restraint was valid as a matter of law. The court initially held that "proof of market power" was a "critical first step, or 'screen,' or 'filter,' which is often dispositive of the case." App. 13a. But in evaluating whether Visa possessed market power, the court treated as unimportant evidence showing that Visa's members collectively account for over 70% of the relevant market.[19] *Id.* 16a-18a. Instead, the court declared that the controlling "legal issue" under its screen was whether the Visa Bylaw resulted in Dean Witter's "exclusion from the market." *Id.* 18a. Because Dean Witter remained able to compete (albeit less effectively) with its proprietary Discover card, the court held that Dean Witter's Section 1 claim failed as a matter of law. *Id.* 18a-19a.

The Tenth Circuit stated its own legal error succinctly: "Surely, if [Dean Witter's] goal is to compete *more effectively* in that market,

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[18] By contrast, in dealing with joint venture restraints other than exclusion from membership, the Seventh Circuit has imposed a threshold market power requirement that focuses on the collective market share of the venture and its members and their ability to disadvantage competitors. *See, e.g., Wilk v. American Medical Ass'n*, 895 F.2d 352, 359-60 (7th Cir.) (defendant medical association crossed market power "threshold" where association's members "constituted majority of medical physicians"), *cert. denied*, 498 U.S. 982 (1990).

[19] To the extent the court considered market share statistics, it focused on the shares of Visa's numerous individual members. App. 17a-18a. By focusing on *individual* member shares, even though Visa's members *collectively* enacted the restraint, the Tenth Circuit is in sharp conflict with this Court's precedents. *See, e.g., Indiana Fed'n of Dentists*, 476 U.S. at 460; *Associated Press v. United States*, 326 U.S. 1, 11 n.7, 18 (1945).

we do not believe this objective constitutes the proverbial sparrow the Sherman Act protects." App. 25a (emphasis in original). Thus, like the other cases that have applied a screen based on whether the defendant venture has the power to exclude entirely from the market, the Tenth Circuit made the mistake of focusing narrowly on whether the *plaintiff* can survive despite its exclusion, and not on whether that exclusion harms *consumers* by preventing more effective competition in the relevant market. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) ("The antitrust laws . . . were enacted for 'the protection of *competition*, not *competitors*.'") (*quoting Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)) (emphasis in original).

Here, the jury specifically found in its special verdict that Visa's Bylaw, which excluded Dean Witter and prevented it from carrying out its desired multi-card strategy, "substantially harm[ed]" not only Dean Witter but also "competition in the relevant market." App 37a. The record established that, despite the numerous members in the charge card market, the entry or expansion of a single large, low-cost producer like Dean Witter would have an important impact on price and output in the market. R. at 693-700, 704-06, 748-52. Moreover, Citicorp's success demonstrates that the ability to offer both proprietary and association cards would enable Dean Witter and all other actual or potential competitors in the market to achieve additional efficiencies and economies of scale and therefore to operate more cost-effectively to the benefit of consumers. R. at 749-54, M687-94, M703-04, M712, M742-43. In sum, the Bylaw created an artificial barrier to competition. Only by ruling out these factors as a matter of law (because none established that Dean Witter was excluded entirely from the market) did the Tenth Circuit reach the untenable conclusion that there was "no evidence" of anticompetitive effect in this case.[20] App. 19a.

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[20] In so holding, the Tenth Circuit disregarded the important principle—recognized by this Court in numerous decisions that did not directly address the issue of a market power screen—that exclusionary restraints can significantly harm competition even where the excluded competitor is not driven entirely from the relevant market. *See, e.g., Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 503 n.8, 508-09 (1988) (firm could challenge anticompetitive conduct that "stigma[tized]"

The Tenth Circuit is in conflict not only with the "no screen" and "collective power screen" cases discussed above, but also with the guidelines issued by the federal antitrust enforcement agencies. Consistent with the "collective power screen" cases, the agencies endorse the use of collective market share as a screen in analyzing joint venture restraints under the rule of reason. *See, e.g., 1995 Intellectual Property Guidelines* at S-12 ("safety zone" applies only where "licensor and its licensees collectively account for no more than twenty percent of each relevant market"); *1994 Health Care Guidelines* at S-17 (physician joint ventures with collective shares below 20% are in a "safety zone"). The agencies also recognize the benefits to competition that can be realized when individual joint venture members are free to compete with the venture's product. *See, e.g., id.* at S-16 to S-17 (providing for a larger "safety zone" for "'non-exclusive' physician network joint ventures" that do not prevent their members from competing with the ventures); *United States v. Electronic Payment Services*, 1994 WL 730003 (D. Del. 1994) (consent decree requiring automatic teller network to allow its members to affiliate with competing networks); *Yamaha Motor Co. v. Federal Trade Comm'n*, 657 F.2d 971, 980-81 (8th Cir. 1981) (upholding FTC determination that joint venture's restriction on competition outside the venture was unlawful), *cert. denied*, 456 U.S. 915 (1982).

The important, outcome-determinative consequences that flow from the circuits' conflicting market power formulations are driven

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its product, "making it difficult . . . to compete"); *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 528 (1983) ("An agreement to restrain trade may be unlawful even though it does not entirely exclude its victims from the market."). *See also Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602-05 (1985) ("If a firm has been 'attempting to exclude rivals on some basis other than efficiency,' it is fair to characterize its behavior as predatory.") (citation omitted). Commentators also recognize that exclusionary conduct aimed at disadvantaging competitors can be an exercise of market power that harms competition. *See* Krattenmaker, Lande & Salop, *Monopoly Power and Market Power in Antitrust Law*, 76 Geo. L.J. 241 (1987); Krattenmaker & Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 Yale L.J. 209 (1986).

home by a comparison of this case to Dean Witter's parallel case against the MasterCard joint venture. There, on virtually identical facts, the District Court for the Southern District of New York permitted Dean Witter to pursue its Section 1 claim under the rule of reason. Reflecting the Second Circuit's sharp conflict with the market power analysis employed by the Tenth Circuit here, the New York court held that notwithstanding Dean Witter's "modest success in the charge card market," it could challenge its exclusion from MasterCard because "the law is well settled that plaintiffs may file a [Section] 1 claim even though they are able to compete in the relevant market." *MasterCard Int'l Inc. v. Dean Witter, Discover & Co.*, 1993 WL 338213, *4 (S.D.N.Y. 1993).[21]

Commentators have deplored the uncertainty regarding the role and definition of market power in rule of reason cases. One recent study reviewed the harmful impact on the American economy caused by confusion in legal planning for "cooperative arrangements among competitors," stressing that courts "have been split over whether market power must be considered in the rule of reason analysis of horizontal restraints." Piraino, *Reconciling Competition*, *supra*, at 892 & n.87. A sitting Federal Trade Commissioner acknowledged the FTC's own antitrust enforcement dilemmas while "still grappling with questions that the Supreme Court left open in *NCAA* and *BMI*," and observed that "[w]hether a market power screen should be grafted onto the truncated rule of reason or even hung temporarily on one of its branches is truly an important, cutting edge question." Azcuenaga, *Market Power as a Screen in Evaluating Horizontal Restraints*, 60 Antitrust L.J. 935, 944 (1992).

Indeed, commentators have already specifically criticized the mischievous implications of the Tenth Circuit's market power analysis in this case. They have recognized that if large joint ventures in fragmented industries are held to lack market power, then "any [such] joint venture that could find indirect methods to raise price through the use of nonprice rules, including exclusionary conduct, would enjoy immunity under the antitrust laws." Carlton & Frankel, *The Antitrust Economics of Credit Card Networks*,

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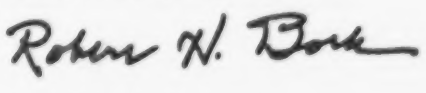
[21] The lawsuit between Dean Witter and MasterCard was later settled.

63 Antitrust L.J. 643, 655 (1995). *See also* Carlton & Salop, *You Keep on Knocking, supra*, at 47-58. This observation underscores the urgent need for the Court to provide authoritative clarification of the proper role and definition of market power in evaluating restraints of trade imposed by joint ventures and other loosely integrated business alliances.

CONCLUSION

For the foregoing reasons, the petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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